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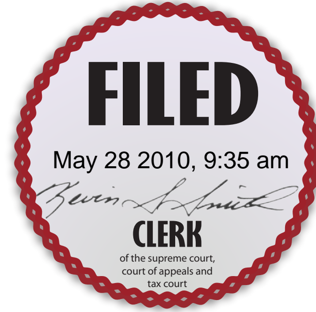

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IN THE COURT OF APPEALS OF INDIANA

S.D.,

Appellant-Petitioner,

vs.

REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT and FLYING J, INC.,

Appellees-Respondents.

No. 93A02-0902-EX-136

APPEAL FROM THE REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
Case No. 08-R-04168

May 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

S.D. appeals the determination of the Review Board of the Indiana Department of Workforce Development (hereinafter, "the Board") that she was fired for just cause. Because the Board's findings are not supported by the evidence, we reverse.

FACTS AND PROCEDURAL HISTORY

S.D. was employed with Flying J from April of 2000 to July of 2008. At all times relevant to this appeal, S.D. was working as a cashier, and Sandra White was the general manager. White determined the company rules should be enforced more strictly. S.D. began to feel the rules were being enforced unfairly and she was being "picked on" for rule violations more than other employees. (Tr. at 7.)

On or around July 16, 2008, S.D. returned to work after a vacation. That day, S.D. was "written up," apparently because White thought S.D. had failed to clock out for a break. (*Id*. at 8.) S.D. claimed she was only in the bathroom, and she was upset that she was written up. The next day, S.D. complained about being written up to Katrina Andrews, the assistant store manager. On July 23, 2008, White fired S.D. based on her conversation with Andrews.

A claims deputy initially found S.D. was eligible for unemployment benefits, and Flying J appealed. A hearing was held before an administrative law judge ("ALJ"), at which White and S.D. testified. White testified S.D. was fired for "threatening management" after Andrews told White about the conversation with S.D. (*Id*. at 4.) White described the conversation as "a pretty loud conversation on the sales floor" in which S.D. told Andrews "she was going [to] curse [White] out if [White] said one more thing to her." (*Id*.)

S.D. denied violating the rules and claimed she was being "picked on." (*Id*. at 7.)

S.D. felt she was fired for speaking up about unfair enforcement of the rules. S.D. admitted having a conversation with Andrews about being written up. She denied cussing, but admitted her voice was "a little elevated" because she was upset. (*Id*. at 12.) S.D. believed Delores McDowell, an employee who overheard the conversation, reported it to White and exaggerated the seriousness of her conduct. S.D. thought White believed Delores because they were friends outside of work.

The ALJ made the following findings:

> Employer discharged Claimant for allegedly making threatening comments to management. Claimant was upset about the fact that management was starting to enforce rules more strictly and she felt she was being picked on especially hard. Claimant made a statement to a member of management that if the general manager didn't stop picking on her she was going to hurt her. The statement was reported to the general manager who in turn made the decision to terminate Claimant.

(Appellant's App. at 2.) The ALJ concluded Flying J had established just cause to terminate S.D. S.D. appealed to the Board, which adopted the ALJ's findings and conclusions and affirmed the decision on January 14, 2009. S.D. now appeals from the Board's decision.

DISCUSSION AND DECISION

S.D. raises one issue, which we restate as whether the Board's decision was supported by substantial evidence. We "utilize a two-part inquiry into the sufficiency of the facts sustaining the decision and the sufficiency of the evidence sustaining the facts." *Whiteside v. Ind. Dep't of Workforce Development*, 873 N.E.2d 673, 674 (Ind. Ct. App. 2007).

> In doing so, we consider determinations of basic underlying facts, conclusions or inferences from those facts, and conclusions of law. The Review Board's findings of fact are subject to a substantial evidence standard of review. "Any decision of the review board shall be conclusive and binding as to all questions

> of fact." I.C. § 22-4-17-12(a). We do not reweigh the evidence or assess the credibility of witnesses. Regarding the Board's conclusions of law, we assess whether the Board correctly interpreted and applied the law.

Id. at 675 (some citations omitted).

> When an employee is alleged to have been terminated for just cause, the employer bears the burden of proof to establish a prima facie showing of just cause for termination. If that has been done, the burden shifts to the employee to introduce competent evidence to rebut the employer's case.

Hehr v. Review Bd. of the Ind. Employment Security Div., 534 N.E.2d 1122, 1124 (Ind. Ct. App. 1989).

The Board found S.D. "made a statement to a member of management that if the general manager didn't stop picking on her she was going to hurt her." (App. at 2.) Neither the ALJ nor the Board cited any evidence to support that finding; rather, the cited pages of the transcript refer only to S.D.'s threat to "curse out" White. (*See* Tr. at 4, 6, 12.) Thus, the finding is not supported by substantial evidence.

While the Board quoted the ALJ's findings in its statement of facts, the argument section of its brief addresses whether Flying J had just cause to terminate S.D. based on her threat to "curse out" White. The Board does not acknowledge this discrepancy. Nor does it cite any authority that, notwithstanding the erroneous finding, we may affirm its ultimate determination based on other evidence in the record. We do not believe we have such authority because, as we have explained: "The Review Board is required to make specific findings of all the facts relevant to the contested issues. It is not within the powers of this court to make a finding of fact." *Ratkovich v. Review Bd. of Ind. Dep't of Employment &*

Training Servs., 618 N.E.2d 44, 46-47 (Ind. Ct. App. 1993) (citations omitted). Our role is simply to review the Board's findings to determine whether they are supported by substantial evidence. *Whiteside*, 873 N.E.2d at 674.

The importance of having accurate specific findings regarding the employee's behavior is underscored by the case the ALJ and the Board cited in support of its conclusion, *Yoldash v. Review Bd. of the Ind. Employment Security Div.*, 438 N.E.2d 310 (Ind. Ct. App. 1982). *Yoldash* addresses when offensive language may support a finding of just cause. *Yoldash* discusses numerous cases, some of which upheld a finding of just cause for termination, and some of which did not. *See id*. at 312-14. Factors considered include:

> the quantity of vulgar or profane language, *i.e.*, whether multiple incidents, lengthy barrage, or a single, brief incident; the degree of severity of the words used; use of the language in the presence of other employees; whether language was directed to a supervisor or to other persons.

Id. at 313. Just cause was less likely to be found when there was "a single, isolated instance of loss of temper, particularly if there was some provocation or justification, and if the language was not especially vituperative." *Id*. at 313.

Accordingly, even if the Board had provided factual findings regarding S.D.'s interaction with Andrews that were supported by the record, those findings may or may not have supported finding just cause for termination. Clearly, threatening physical harm to a supervisor is more serious than threatening to swear at a supervisor. The erroneous finding that S.D. threatened to hurt White may well have tipped the scales in favor of the employer. Therefore, we conclude the erroneous finding requires reversal of the Board's decision.

Reversed.

BAILEY, J., and BARNES, J., concur.